Supreme Court, U.S.
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No. 01-1061

In the Supreme Court of the United States

PROGRAMMED LAND, INC., ET AL.,

Petitioners,

v.

PATRICK O'CONNOR, IN HIS CAPACITY AS TREASURER AND AUDITOR FOR HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

REPLY BRIEF FOR PETITIONERS

ALAN L. KILDOW
SONYA R. BRAUNSCHWEIG
Larkin, Hoffman, Daly & Lindgren, Ltd.
1500 Norwest Financial Center
7900 Xerxes Avenue South
Bloomington, MN 55431-1194

ANDREW L. FREY
Counsel of Record
CHARLES ROTHFELD
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

ROBERT A. HILL
Robert Hill & Associates
Centre Village Offices
431 South Seventh Street
Minneapolis, MN 55415-9788

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

In the petition, we explained that the decision below is inconsistent with fundamental requirements of due process. The respondent counties demanded excessive property tax payments while offering petitioner taxpayers no meaningful opportunity to determine that the amounts demanded were incorrect. The court below then held that the time for challenging these illegal taxes had expired before petitioners possibly could have discovered the error. That court went on to engage in a "bait and switch," holding that petitioners could not assert a common law refund action that had been available in Minnesota for 100 years.

In their briefs in opposition, the counties entirely fail to come to grips with these points. They make no attempt to defend the constitutional analysis used by the Minnesota Supreme Court; to the contrary, their principal argument rests on an assertion that actually was *rejected* by the court below. The counties also do not dispute that petitioners reasonably relied on the existence of common law remedies that were pulled out from under them by the Minnesota Supreme Court. And the counties do not deny the very considerable practical significance of this case. In these circumstances, the counties have not advanced any plausible reason for this Court to deny review.

1. The counties recognize, as they must, that taxing authorities are obligated to offer taxpayers a meaningful opportunity to contest illegal taxes. Because the court below held that the time for seeking a property tax refund under Minnesota law expires almost simultaneously with the mailing of tax bills, the counties also recognize that, to comport with due process requirements, taxpayers in the State must be given notice from which they can determine the invalidity of the

amount demanded.[1] The court below held this requirement satisfied here because, some months ahead of the filing date, Minnesota taxpayers receive an estimate of the amount of tax due and may "inquire as to the basis of the tax and then challenge it if the taxpayer believes it was calculated improperly." Pet. App. 21a. Thus, as we explain in the petition, the holding below is that, even though Minnesota law explicitly allows taxpayers to rely upon the correctness of their property tax bills, taxpayers nevertheless are on a sort of perpetual inquiry notice that the wrong rates may be applied. Under that holding, taxpayers waive their rights to challenge illegal taxes unless – prior to receiving their tax bills and without any reason to believe that taxing authorities plan to act illegally – the taxpayers contact tax officials, determine the rate those officials plan to use in calculating the tax, and file suit to contest an error. See Pet. 16-17.

The counties make no attempt to defend this remarkable holding. Instead, their principal argument against review is that the notices sent to taxpayers in fact *did* allow them to determine at a glance that the wrong rate would be used by tax officials to calculate the amount of tax demanded. To establish this point,

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[1] The Minnesota Supreme Court acknowledged that tax bills "must be sent out no later than March 31 of the year in which taxes are due" (Pet. App. 20a) – which is to say, the bills may be mailed on *the very day* that the time for filing a challenge under Minn. Stat. § 278.01 expires. Hennepin County (but not Dakota County) now states that its bills "were mailed to taxpayers between seventy-three and thirteen days before the deadline for filing tax petitions." Hennepin Br. 8-9. Needless to say, mailing bills that offer no way to determine use of an illegal rate two weeks (or two months) before the expiration of the challenge deadline does not offer taxpayers a meaningful opportunity to contest wrongful deprivations of property. For its part, Dakota County does not deny that taxpayers may have received their tax bills after the challenge deadline passed; that county observes only that tax bills "must be sent to the taxpayers by March 31 of the year taxes are due." Dakota Br. 3.

the counties declare that the various notices sent to taxpayers identified properties as "commercial" or "industrial," and that the notices sent to owners of properties that would receive the special, favorable rate also contained the words "low-rate" or "preferred." Hennepin Br. 1, 4, 8, 11; Dakota Br. 9. Therefore, the counties assert, "[i]t *was* possible from the words used on the bills and notices to know whether the assessor determined the property received the commercial low class or commercial regular class [rate]," and making this determination "would have taken [the taxpayer] seconds." Hennepin Br. 8, 11 (emphasis in original); Dakota Br. 9.

The counties made this same factual argument to the Minnesota Supreme Court (see Minn. Sup. Ct. Hennepin Reply Br. 2-3; Minn. Sup. Ct. Dakota Reply Br. 9-10) – which did *not* accept it. To the contrary, that court candidly acknowledged that "the notices [sent to taxpayers] did *not* contain information from which [petitioners] could determine that the counties applied the wrong class rate." Pet. App 7a. In this, the Minnesota court plainly was correct. Because there was no separate statutory classification in Minnesota for properties entitled to the low rate, and because the "preferred" nomenclature used in the counties' briefs does not appear in any statute – or, for that matter, in any county publication or guide that is generally available to taxpayers – petitioners *would have had no way to know* that the omission of the term "preferred" or "low-rate" from their notices signified denial of the proper rate. Needless to say, taxing authorities plainly do not provide adequate notice by speaking in a sort of secret code that cannot be deciphered by even extraordinarily diligent taxpayers.

The counties thus make no attempt to defend the constitutional analysis used by the court below. Instead, they premise their case on a factual contention that the Minnesota Supreme Court itself rejected. In these circumstances, further review of the due process question actually decided by the Minnesota court is warranted.

2. The remaining due process arguments advanced by the counties are wholly insubstantial. *First*, Dakota County contends that its system must provide adequate notice because "[p]etitioners did file their tax petition in time to challenge the 'assessment process' for taxes owed in 1994." Dakota Br. 3; see *id.* at 5. It is true that one petitioner – out of the more than 1600 whose claims are now before the Court – was able to advance his claim as to a single tax year (out of the six at issue before the Court) within the Minn. Stat. § 278.01 deadline. But this hardly makes the counties' case. As we explained in the petition (at 7-8), this one fortunate petitioner was informed of the error by an independent tax representative who happened to uncover it while conducting an audit of Dakota County's tax records. The possibility that errors may be discovered by tax professionals when they root through county files surely does not mean that the counties provide meaningful and adequate notice to taxpayers.

Second, Dakota County also asserts that Minnesota taxpayers have many opportunities to challenge illegal taxes. Dakota Br. 10-11, 12-13. As we explained in the petition (at 18 n.11), however, the mechanisms cited by the county all either must be invoked prior to the March 31 deadline (when taxpayers would have had no opportunity to discover the illegality) or are wholly discretionary with county tax officials. Dakota County makes no response to these points.

Third, Dakota County plainly is wrong in contending that the decision below rested on adequate state law grounds. Dakota Br. 6. Of course, the Minnesota Supreme Court's holding that Minn. Stat. § 278.01 governs here involves a state law determination that is not reviewable in this Court. But our argument is an entirely different one: accepting this state law holding, we maintain that § 278.01, as construed and applied by the Minnesota Supreme Court, is inconsistent with the U.S. Constitution. That federal law argument was considered and rejected by the court below. See Pet. App. 19a-22a.

Fourth, Hennepin County contends that this case is "moot for taxes after 1997" because the Minnesota legislature has prospectively eliminated the dual-rate treatment for commercial and industrial property that gave rise to petitioners' tax challenge. Hennepin Br. 1, 9. But this argument misses the point. Petitioners' entitlement to refunds for the tax years at issue in this litigation is unaffected by the legislation. And the due process issue presented here – concerning the constitutional adequacy of notice in circumstances where the state offers taxpayers no mechanism by which they may determine and remedy illegality in the tax assessment process – can arise in a wide array of settings. Minnesota's limited statutory change therefore does not at all diminish the importance of review.

3. In arguing against review of the equal protection issue presented in the petition, the counties maintain that differential treatment of identically situated taxpayers that is attributable to "bureaucratic error" may not give rise to a constitutional violation. Hennepin Br. 12-13; Dakota Br. 8-9. But the counties' attempts to distinguish this Court's relevant equal protection decisions are unavailing. Hennepin County contends that *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), is inapposite here because the differential treatment in that case allegedly was attributable to "'vindictive action' on the part of government officials." Hennepin Br. 12. In fact, however, the Court held that the allegation of "'irrational and wholly arbitrary'" government conduct was sufficient to state an equal protection complaint "quite apart from the Village's subjective motivation." 525 U.S. at 565. Compare *id.* at 565-566 (Breyer, J., concurring in the result) (hinging result on subjective "'ill will'"). Similarly, Hennepin County maintains that *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 42 (1982), is distinguishable because that case was decided on due process grounds. Hennepin Br. 13. But while the majority opinion in *Logan* did find a due process violation, six Justices, in two separate opinions, also concluded that differential treatment attributable to "bureaucratic oversight" is inconsistent with equal protection

requirements. See Pet. 24. The counties do not address this point.[2]

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN L. KILDOW
SONYA R. BRAUNSCHWEIG
Larkin, Hoffman, Daly & Lindgren, Ltd.
1500 Norwest Financial Center
7900 Xerxes Avenue South
Bloomington, MN 55431-1194

ANDREW L. FREY
Counsel of Record
CHARLES ROTHFELD
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

ROBERT A. HILL
Robert Hill & Associates
Centre Village Offices
431 South Seventh Street
Minneapolis, MN 55415

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[2] Hennepin County also asserts that petitioners' equal protection claims are time-barred because they were not filed pursuant to Minn. Stat. § 278.01 by the March 31 deadline. Hennepin Br. 13-14. As we noted in the petition, however, the Minnesota Supreme Court expressly declined to decide whether that deadline governed petitioners' equal protection claims, instead choosing to resolve the merits of the constitutional question. See Pet. 22-23 & n.14. The availability of a state or federal statutory remedy would be addressed on remand if this Court were to set aside the Minnesota Supreme Court's equal protection ruling.